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No. 86-285

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JAMES E. DOYLE, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

ALLAN K. BUTCHER
Counsel of Record

TOM E. HILL
Counsel for Petitioner

ZACHRY, KEARNEY, HILL,
BEATTY & BUTCHER
Suite 606
One Tandy Center
Fort Worth, Texas 76102
(817) 336-3600

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Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

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Petitioner's Reply to the

Brief in Opposition to Certiorari

I.

The Validity of the Permits

The permits, signed by the Bureau Chief of the Law Enforcement Division of the Montana Fish, Wildlife and Parks Department, were valid and proper authorizations permitting the interstate transfer of the two birds that gave rise to this case. (Pet. App. A-30; A-31).

These permits were not "false" (Gov't. Brief, p. 9) or obtained through subterfuge or misrepresentation. The fact that McPartlin told the Petitioner and others that the Montana permits were a "cover" (ibid) did not make them false or invalid.

The government has emphasized that the Petitioner knew the permits were "false" because McPartlin had said so to him and the others. What the government informer told the others, of course, is of no consequence since the jury specifically rejected the government's conspiracy allegation. What the Petitioner "knew" or thought about the validity of the permits is not really the issue. The proper question is whether the permits were actually valid or not. The government's brief could not cite a single item of evidence

to support their position that the permits were invalid - other than the government's paid informer who testified to this effect - and who did so without offering any support for his conclusion. A review of the record shows the permits were, in fact, valid.

The administrative head of the Montana licensing agency, Chief R. H. Bird, testified the two permits had been issued by his office, signed by Bird, himself, acting in his official capacity. He further testified that these permits authorized the transfer of these specific birds (Tr. 855-856). The Petitioner played no part in obtaining the permits as these had been secured by the government prior to the Petitioner's arrival in Montana. If the State of Montana was duped into issuing these permits and these were somehow "false",

it resulted from the actions of McPartlin and the government, not from actions of the Petitioner.

II.

The Internal Conflict in the Opinion of the Ninth Circuit

As the government notes in its brief, "The felony provision of the Lacey Act, of which petitioner was convicted, requires the government to prove that the defendant knew that the wildlife involved was illegally taken, possessed, transported or sold." (Gov't. Brief, p. 2). In Footnote 9 of its response the Government further states: "These birds were taken from the wild by other subjects of the investigation (Tr. 387-388), not - as petitioner asserts (Pet. 19) - by government agents." These pages, referred to by the government, are to the only evidence of

the origin of the birds - and that is the hearsay testimony, noted by the Court of Appeals, which undermined the Petitioner's Endangered Species Act conviction.

The only conclusive way to identify a subspecies of a falcon is by the location of its habitat in the wild (Gov't. Brief, p. 6). The Ninth Circuit Court held that "McPartlin had no first-hand knowledge of the falcons' origins. He was told by other government agents where the falcons had been trapped" (Pet. App. A-18). Because the government failed to prove the origins of the birds the Court of Appeals held that they had necessarily failed to prove the birds were Anatum Peregrine Falcons, as required by the indictment. Obviously, if McPartlin's testimony that the birds were obtained

from Utah and Arizona was invalid hearsay, then his testimony that they were trapped from the wild in Utah and Arizona is equally invalid.

The Lacey Act violation required the government to prove the birds had been illegally taken from the wild (Gov't. Brief, p. 2), but the only evidence of the origin of the birds was McPartlin's hearsay testimony. Specifically, McPartlin testified that Yancey Cox told him that Roger Claude had trapped one bird in Arizona (Pet. p. 27) and that someone else, unnamed in the record, had told him that the second bird had been taken from the wild in Utah by Jeff Shelberg (Pet. p. 28). There was no other evidence on this issue. Since Count III, the Endangered Species conviction, required the government to prove the birds were

Anatum Peregrine Falcons and this required they prove the state from which the birds had originated, the conviction on that count fell. Likewise Count II of the indictment, the Lacey Act conviction, required the government to prove the birds had been taken from the wild. Since the only evidence on that issue was the same hearsay testimony of McPartlin about what other persons knew and did, that conviction must also fall. Logically there is no alternative.

III.

Summary

The Montana permits were valid authorizations for the Petitioner to transport these birds to Texas and, therefore, there was no underlying state offense. Secondly, the holding of the Ninth Circuit is internally contradictory. That Court held that the

evidence that the birds had been taken from Arizona and Utah was impermissible hearsay, but approved that same testimony as the proof that the birds had been trapped in the wilds of Arizona and Utah. This is contradictory and calls for action by this Court in its supervisory role and to ensure due process to the Petitioner.

The Petitioner, therefore, renews his request that a writ of certiorari issue to review the decision below.

Respectfully submitted,

ALLAN K. BUTCHER
Counsel of Record

TOM E. HILL
Counsel for Petitioner

ZACHRY, KEARNEY, HILL,
BEATTY & BUTCHER
One Tandy Center, Suite 606
Fort Worth, Texas 76102
(817) 336-3600